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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1283

ALABAMA POWER COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

On Appeal From the United States District Court for the District of Columbia

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REPLY TO MOTION OF ABERDEEN AND ROCKFISH RAILROAD COMPANY ET AL. TO AFFIRM

Appellees Aberdeen and Rockfish Railroad Company et al. (Railroads) have filed a single motion to dismiss in this case and in Docket No. 1083, *Atlantic City Electric Company et al.* v. *United States of America et al.* The United States, the Interstate Commerce Commission (Commission) and the Secretary of Agriculture (Secretary) have filed a joint Memorandum in both

cases in which they concede that No. 1283 was wrongly decided by the Court below, stating:

> "... the complaint in *Alabama Power* ... states a claim warranting direct judicial review." (p. 6)

The Railroads claim that the case is not ripe for judicial review on the theory that Appellants had available an alternative remedy before the Commission by filing a complaint under Section 13 of the Interstate Commerce Act.[1] The United States and the Commission disagree. They concede that no such remedy is available (Memorandum pp. 6-7).

The Railroads' motion suggests that the Commission's decision in *Ex Parte 259* was a tentative ruling subject to being affirmed or reversed upon more mature consideration in some later proceeding. No less than seven times is it characterized as "preliminary":

> "... The Commission has merely found in a *preliminary*[2] way that an overall increase in rates is not unreasonably large ..." (p. 5)
>
> "A general revenue proceeding ... amounts to a *preliminary* scrutiny of carrier-initiated increases ..." (p. 8)
>
> "It merely determines, in a *preliminary* way, whether it appears that the rate increases are justified ..." (p.)
>
> "It made a *preliminary* determination that the published increases are not unreasonable ..." (p. 12)

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[1] The Railroads have abandoned the contention, on which they placed major reliance in the Court below, that the Commission's order is unreviewable because permissive. They now concede that "One does not need the *City of Chicago* decision to know that such a position is not tenable today" (p. 14).

[2] Emphasis supplied unless otherwise noted.

". . . an order of the Commission based on quite *preliminary* and general findings" (p. 15)

". . . the data and arguments pertinent to the *preliminary*, general findings . . ." (p. 19)

"The Commission made findings . . . the *preliminary nature of the proceeding required.*" (p. 20)

Preliminary to what? The proposed increased rates were allowed to become effective and, just as in *City of Chicago* v. *United States*, 396 U.S. 162, the investigation was discontinued by the Commission. The increased rates are being collected by the carriers and paid by the shippers. No action has been taken subsequent to discontinuance of the proceeding and, to our knowledge, none is contemplated by the Commission unless required by the Court. "Preliminary" is a curious way to characterize action which authorizes substantial increases in freight rates, finds that "The increased freight rates and charges authorized herein will not exceed a maximum reasonable level . . .", and directs entry of an appropriate order "modifying all our outstanding orders to the extent necessary to permit the maintenance of the increased freight rates and charges herein authorized, and granting relief from the provisions of section 4 of the act . . . as may be necessary."[3] (J. S. App. C, p. 792)

The Railroads also suggest that the Commission's final action was "altogether like making a decision not to suspend" (p. 12). On the contrary, the preliminary decision as to whether to suspend was made

[3] The Railroads state that the purpose in filing the petition in *Ex Parte 259* was principally to obtain relief from technical tariff publication rules. (Motion, p. 2) Modification of outstanding Orders and Fourth Section relief was also sought and obtained. These are not technicalities.

by the Commission on June 19, 1968. On that date the Commission suspended the increases in part and instituted an investigation "concerning the lawfulness of all the rates, charges and regulations which were contained in the suspended schedules as aforesaid, as well as the schedules herein authorized to be filed" (Order of June 19, 1968, p. 2). Thereafter a full hearing was held.

There was nothing preliminary about the final order. It was a final order which resolved the issues once and for all after plenary consideration on a complete record.

The Railroads acknowledge that the Commission's order in a Section 15(7) investigation proceeding "whether it results in cancellation of a rate or simply in discontinuance of the proceeding, is of course reviewable in court." (Motion, p. 8) But *Ex Parte 259 was* a Section 15(7) investigation. The Railroads are urging that a Commission order authorizing an increase in some rates is "of course" reviewable, but that an order authorizing an increase in all rates is unreviewable. This would indeed be an anomalous situation.

The Railroads argue that, in spite of the fact that the Commission entered a final order authorizing the increases to go into effect, Appellants still have an adequate remedy by filing a complaint before the Commission. They ignore the fact that this is a class action which seeks review of the lawfulness of the increase as applied to all rates and not the lawfulness of any particular rate or rates.[4] Appellants concede

[4] Appellants are shippers or associations of shippers who are bearing over 20% of the total increase.

for purposes of this lawsuit that if the Commission's order is lawful, their rates as increased are lawful. The proposal that they file proceedings before the Commission attacking the lawfulness of many thousands of rates and then advise the Commission in such proceedings that their only complaint against such rates is that the increases authorized in *Ex Parte 259* were not justified would seem to be answered by its very statement. Appellants have nothing to litigate in a Section 13 case except the issues already litigated in *Ex Parte 259*. And the Commission would not permit such issues to be relitigated in a Section 13 case. (Memorandum, pp. 6-7). That cost of handling particular traffic will be looked at in a case involving rates on that traffic does not mean, as the Railroads seem to suggest, (Motion p. 16) that the Commission will permit such a proceeding to be a vehicle for relitigating issues already decided in a general increase case.

The Railroads state that if the Court notes probable jurisdiction they will urge as an alternative ground for affirming the District Court's judgment that the Commission's order should be sustained on the merits and the complaint dismissed for that reason.

We do not propose to respond to the argument on the merits beyond stating that the complaint in No. 1283 does raise serious issues as to sufficiency of findings and the Commission's interpretation of the statute, as well as questions of substantial evidence. (J. S. p. 5) The court below did not reach these issues; the only question passed on was the availability of judicial review. That is the only issue raised by this appeal and we assume that it is the only one which this court will consider.

CONCLUSION

It is submitted that the Motion of the Railroads to affirm should be denied and probable jurisdiction should be noted. It is also submitted that summary reversal would be appropriate.

Respectfully submitted,

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